United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-2078

To be argued by
DAVID W. O'CONNOR

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-2078

UNITED STATES OF AMERICA,
Appellee,

—v.—

GLEN FREDERICK WRIGHT,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Glen Frederick Wright appeals from an order of the United States District Court for the Southern District of New York, filed October 29, 1973, by the Honorable Sylvester J. Ryan, United States District Judge, denying Wright's petition under Title 28, United States Code, Section 2255 to vacate a judgment of conviction and sentence entered in the Southern District of New York on June 15, 1972 on Indictment 72 Cr. 407.

On April 7, 1972, Indictment 72 Cr. 407 was filed, charging Wright with conspiracy to violate the narcotics laws, in violation of Title 21, United States Code, Sections 812, 841(a)(1), and 841(b)(1)(B) (Count One), and with the substantive violations of these sections (Counts Two and Three). On May 1, 1972, Wright pleaded guilty to Count Two, which charged him with possession of 49,116 grams of marijuana with the intent to distribute, in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(B). On June

15, 1972, Wright was sentenced to three years imprisonment to be followed by two years special parole. He was remanded on the day of sentence.

On July 30, 1973, Wright filed a pro se petition for a writ of habeas corpus, seeking to withdraw his plea of guilty on the ground that it had been involuntary due to the district court's failure to advise him, at the time of his plea, that his sentence would include two years special parole. At the time of that petition Wright was in federal custody serving the sentence imposed by Judge Ryan. By endorsement order filed October 30, 1973, Judge Ryan denied the petition. On December 7, 1973, Wright filed a motion to reargue. On January 23, 1974, Judge Ryan denied that motion.

On March 4, 1974, Wright filed a notice of appeal and the record was docketed on March 29, 1974. However, a brief was not filed timely.

On June 28, 1976, after the passage of two and one half years since the filing of the notice of appeal in this case, the Government moved to dismiss the appeal for lack of prosecution. On August 16, 1976, the day before that motion was scheduled to be heard, counsel for Wright filed a brief in this case. On August 17, 1976, this Court denied the Government's motion to dismiss.

Wright is presently in state custody.

Statement of Facts

On May 1, 1972, accompanied by counsel, Wright pleaded guilty to Count Two of Indictment 72 Cr. 407. Judge Ryan conducted a *voir dire* pursuant to Rule 11 of the Federal Rules of Criminal Procedure, eliciting Wright's understanding of the nature of the charge and the consequences of the plea. However, before conducting

the *voir dire*, Judge Ryan had the following exchange with Wright's attorney, Earle J. Bishopp, Esq.:

> "The COURT: Did you consult with your client about this case?
>
> MR. BISHOPP: Yes, I did. I considered several times with him.
>
> THE COURT: Did you tell him anything about the significance of this plea of guilty which he is about to enter?
>
> MR. BISHOPP: Well, there are some extenuating circumstances in this case——
>
> THE COURT: No; did you explain to him his constitutional rights?
>
> MR. BISHOPP: Yes. I explained to him the penalty and I explained everything to him about it." (Plea minutes 5/1/72, 4).

Judge Ryan then proceeded with the *voir dire* in which it was established that Wright was twenty-eight years old and that he was taking courses in "marketing, advertising and retailing" at a junior college. (Plea minutes 5/1/72, 6). Subsequently, Judge Ryan explained the maximum prison term and fine to which Wright was subjecting himself by pleading guilty:

> "Q. Do you realize that by this plea of guilty you subject yourself to a possible punishment of not more than five years and a fine of $15,000, or both a prison term of not more than five years and a fine of not more than $15,000, or a combination of a lesser term of years and a lesser amount of fine than $15,000? Do you understand that?
>
> A. Yes, I do." (Plea minutes, 7).

The court failed to mention its obligation to impose mandatory special parole.

On June 15, 1972, Judge Ryan sentenced Wright to three years imprisonment. No mention was made of

mandatory special parole until the following colloquy took place on that date:

> "THE COURT: On the consent of the Government, the other counts of the indictment to which this defendant has pled not guilty are dismissed. The sentence on Count 2 is a term of three years imprisonment and the defendant is remanded.
> I don't think there is any mandatory parole with respect to Marijuana.
> MR. BISHOPP: I thought there was a two year parole, Your Honor.
> THE COURT: If there is, I impose a mandatory two year parole sentence in addition to the three years imprisonment. The defendant is remanded.
> MR. BISHOPP: I am sorry, Your Honor, I didn't understand that.
> THE COURT: The sentence is three years and he has a mandatory parole of two years after that under the statute.
> MR. BISHOPP: Thank you, Your Honor."
> (Sentencing Minutes 6/15/72, 8-9).

It is to be especially noted that Mr. Bishopp stated at the time of the plea that he had discussed the penalties with Wright and that it was he who raised at time of sentence the necessity of imposing mandatory special parole. No suggestion was made by either Wright or his attorney that the special parole term came as a surprise. No appeal was taken.

ARGUMENT

The District Court Properly Denied Wright's Petition To Vacate His Conviction And Sentence Pursuant To Title 28, United States Code, Section 2255.

Wright's petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2255, alleges that his conviction must be vacated on the ground that his guilty plea was involuntary.* The record of the taking of his guilty plea discloses that the district judge did not advise him that the offense to which he was pleading guilty required, if Wright were sentenced to a term of imprisonment, that a mandatory period of special parole also be imposed. Since this Court has held that in such circumstances Rule 11 of the Federal Rules of Criminal Procedure requires that a "defendant . . . be advised that . . . [a special parole term] will be imposed . . . [and] also be asked by the court if he understands that fact" before his guilty plea may be accepted, *Michel* v. *United States*, 507 F.2d 461, 463 (2d Cir. 1974), Wright

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* Although the record on this point is unclear it would appear that Wright is no longer a prisoner in federal custody. Assuming that Wright received the statutory credit for good conduct, 18 U.S.C. § 4161, his mandatory release would have occurred in July 1974. Consequently, his two year special parole would have terminated in July 1976. However, his petition for a writ of habeas corpus would not be mooted by reason of his unconditional release, *Carafas* v. *LaVallee*, 391 U.S. 234 (1968); *United States* v. *Loshiavo*, 531 F.2d 659, 662 (2d Cir. 1976), and, in any event, if denied relief on this basis he could file a petition for *coram nobis*, 28 U.S.C. § 1651(a), although relief "should be allowed through this extraordinary remedy only under circumstances compelling such action to achieve justice." *United States* v. *Morgan*, 346 U.S. 502, 511 (1954). *See also, United States* v. *Travers*, 514 F.2d 1171, 1173 n.1 (2d Cir. 1974). The Government contends that a writ of habeas corpus would not properly be granted in this case. *A fortiori*, a writ of *coram nobis* would not lie.

asserts that he is entitled to have his conviction and sentence vacated under *McCarthy* v. *United States*, 394 U.S. 459 (1969), and to plead anew.

We respectfully submit that the District Court properly denied the petition. The period of imprisonment and the term of special parole imposed were together the same as the maximum period of imprisonment which Judge Ryan, before accepting the plea, advised Wright that he was subjecting himself to by pleading guilty. Wright is not entitled to relief under 28 U.S.C. § 2255 merely because the trial judge failed to advise him specifically that a mandatory period of special parole might be imposed.

The law is settled in this Circuit that a petition under Section 2255 may be denied without a hearing if it does not contain averments which, if true, would entitle the petitioner to relief under that section. *Dalli* v. *United States*, 491 F.2d 758, 760-761 (2d Cir. 1974). See generally *Taylor* v. *United States*, 487 F.2d 307 (2d Cir. 1973). Wright's petition was insufficient to entitle him to relief because the claim made below is not cognizable under Section 2255.

POINT I

Wright's petition below failed to state a claim cognizable under 28 U.S.C. § 2255.

The precise boundaries of claims cognizable under Section 2255 were described by the Supreme Court in *Davis* v. *United States*, 417 U.S. 333, 346 (1974), which permits relief under Section 2255 for a non-constitutional claim only upon a showing of "a fundamental defect which inherently results in a complete miscarriage of

justice" and "exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." *See also United States* v. *Travers*, 514 F.2d 1171 (2d Cir. 1974), *United States* v. *Sobell*, 314 F.2d 314, 323 (2d Cir.), *cert. denied*, 374 U.S. 857 (1963).

Although Wright in his petition below claims that he was unaware of the possibility of mandatory special parole at the time of sentencing and that if he had been so aware he would have acted otherwise, his brief contains no constitutional claim whatsoever.* Rather, Wright's brief claims no more than a failure to comply with Rule 11 arising from Judge Ryan's oversight in not advising Wright of the possibility of a mandatory special parole term before accepting his guilty plea. Thus Wright's argument is simply that since this Court held in *Michel* that mandatory special parole is a possible consequence of a guilty plea which Rule 11 requires a defendant to be informed of by the District Court before

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* Despite Wright's assertion, totally unsubstantiated by any proof in his petition below, that he was unaware of the possibility of mandatory special parole and that he would have acted otherwise if he had so known, it seems quite evident that Wright was most certainly aware of the mandatory special parole provision himself. It is clear from the transcript of the sentence that it was Wright's own attorney who reminded Judge Ryan of the mandatory special parole provisions. (Sentencing minutes 6/15/73, 9). At the plea, defense counsel stated that he had conferred with his client several times and had discussed the penalty with him. (Plea minutes 5/1/72, 5). It can be fairly concluded on this record that Wright had been made aware of the special parole provision by his own attorney and that Wright's plea was the result of an intelligent and full consideration of the alternatives facing him. Wright did not avail himself of direct appeal immediately after learning of the special parole, all of which reinforces the impression that his plea was an informed one. *See generally United States* v. *Welton*, 439 F.2d 824 (2d Cir.), *cert. denied*, 404 U.S. 859 (1971); *Korenfeld* v. *United States*, 451 F.2d 770 (2d Cir. 1971), *cert. denied*, 406 U.S. 975 (1972).

such a plea may be accepted, *McCarthy* v. *United States*, *supra*, requires that he be allowed to plead anew on account of the District Court's failure in this case to so comply with Rule 11. The principal point, ignored by Wright's argument, is that the remedy of pleading anew announced in *McCarthy* for non-compliance with Rule 11 was specifically said to be provided under the Supreme Court's supervisory powers, 394 U.S. at 464, not on a constitutional or statutory basis, and was allowed in the context of a direct appeal from a judgment of conviction, not on post-conviction collateral attack under 28 U.S.C. §2255. Nothing in *McCarthy* suggests that the same remedy is automatically available under Section 2255 or that any manner of non-compliance with Rule 11 may be sufficient grounds for relief under Section 2255.

While the Supreme Court has not directly qualified the *McCarthy* rule in a case brought under Section 2255, *Hill* v. *United States*, 368 U.S. 424 (1962) held in an analogous context that mere non-compliance with a Rule of Criminal Procedure, without more, was not a sufficient ground for relief on collateral attack. *Hill* involved the failure by the district court to permit the defendant to speak on his own behalf prior to the imposition of sentence, as required by Rule 32(a) of the Federal Rule of Criminal Procedure. Although the Justices had earlier agreed, *Greed* v. *United States*, 365 U.S. 301 (1961), that the right was an ancient and valuable one mandatorily preserved by Rule 32(a)—indeed, one might suggest, at least as valuable as the right Wright claims here—the Court noted that:

> "The failure of a trial court to ask a defendant represented by an attorney whether he has anything to say before sentence is imposed is not of itself an error of the character or magnitude cognizable under a writ of habeas corpus. It is an error which is neither jurisdictional nor

> constitutional. It is not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure." 368 U.S. at 428.*

Recent decisions of this Court in cases involving post-conviction collateral attacks for non-compliance with Rule 11 have not explicitly considered whether the "automatic reversal" rule in *McCarthy* is fully applicable in proceedings under Section 2255; *e.g.*, *Michel* v. *United States*, *supra*; *Irizarry* v. *United States*, 508 F.2d 960 (1974). *Rizzo* v. *United States*, 516 F.2d 789 (2d Cir. 1975).** However, that mere non-compliance with Rule 11 is not of itself a sufficient ground for collateral relief under Section 2255 was made clear in this Circuit in Judge Friendly's concurring opinion in *Manley* v. *United States*, 432 F.2d 1241, 1247 (2d Cir. 1970) (en banc). In other Circuits the distinction between the "automatic reversal" provided by McCarthy on direct appeal and the far more restricted availability of relief under Section 2255 for non-compliance with Rule 11 has been frequently emphasized. *United States* v. *Blair*, 470 F.2d 331, 340 n.21 (5th Cir. 1972), *cert. denied*, 411 U.S. 908 (1973); *Limon-Gonzalez* v. *United States*, 499 F.2d 936, 937-938 (5th Cir. 1974); *United States* v. *Maggio*, 514 F.2d 80, 87 (5th Cir.), *cert. denied*, 423 U.S. 1032 (1975); *United States* v. *Smith*, 440 F.2d 521, 527-29 (7th Cir. 1971) (Stevens, *C.J.*, dissenting); *Arias* v.

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* This court recently followed the *Hill* decision in affirming the denial of a petition for a writ of habeas corpus based on a claim that the right of allocution at the time of sentence had not been accorded. *Lunz* v. *Henderson*, 433 F.2d 1322 (2d Cir. 1976). However, since that case arose in the context of a state court proceeding, Rule 32(a) was not invoked.

** This can no doubt be explained by the Government's failure to raise the question.

United States, 484 F.2d 577, 579 (7th Cir. 1973) (Stevens, *C.J.*), *cert. denied*, 418 U.S. 905 (1974); *Gates* v. *United States*, 515 F.2d 73, 76-77 (7th Cir. 1975); *Bachner* v. *United States*, 517 F.2d 589 (7th Cir. 1975); *Sappington* v. *United States*, 523 F.2d 858, 860 (8th Cir. 1975) (Webster, *C.J.*, concurring).

Here, it is clear that Wright raised below no more than "a failure to comply with the formal requirements of the Rule," *Hill* v. *United States*, *supra*, 368 U.S. at 429, which does not entitle him to any relief under Section 2255, as the cases last cited in the paragraph above made abundantly clear if any question remained after *Hill* itself. See also *United States* v. *Wright*, 524 F.2d 1100 (2d Cir. 1975); *United States ex rel. Roldan* v. *Follette*, 450 F.2d 514, 517 (2d Cir. 1971); *United States* v. *Welton*, *supra*, 439 F.2d at 826-827. Moreover, since the sentence imposed on Wright—three years imprisonment and two years special parole—was the same as the imprisonment of which he was warned by Judge Ryan when he pleaded guilty, Wright would be entitled to no relief under Section 2255 even if it is claimed that Wright was unaware of the possibility that a special parole term might be imposed and that he would not have pleaded guilty if he had known. *McRae* v. *United States*, Dkt. No. 76-1206 (8th Cir., Aug. 26, 1976); *Bachner* v. *United States*, *supra*, 517 F.2d at 596-597; *United States* v. *Smith*, Dkt. No. 75-2199 (4th Cir., Apr. 8, 1976); *Lee* v. *United States*, Dkt. No. 75-2009 (4th Cir., Aug. 25, 1976); *Bell* v. *United States*, 521 F.2d 713 (4th Cir. 1975), *cert. denied*, 424 U.S. 918 (1976); *See also United States* v. *Woodhall*, 438 F.2d 1317, 1328-1329 (5th Cir.) (en banc), *cert. denied*, 403 U.S. 993 (1971). *But see United States* v. *Yazbeck*, 524 F.2d 641 (1st Cir. 1975); *Roberts* v. *United States*, 491 F.2d 1236 (3d Cir. 1974); *United States* v. *Wolak*,

510 F.2d 164 (6th Cir. 1975); *United States* v. *Richardson*, 483 F.2d 516 (8th Cir. 1973).* There can simply have been no prejudice to Wright—much less a "fundamental defect which inherently results in a complete miscarriage of justice"—from a failure on Wright's part to understand that special parole might be imposed, in view of the fact that the total period in imprisonment and special parole to which he was sentenced was equal to the period of imprisonment that Judge Ryan warned Wright he faced before accepting his guilty plea.

Although not cited in Wright's brief, the strongest precedent in this Court for his position is *Ferguson* v. *United States*, 513 F.2d 1011 (2d Cir. 1975). In *Ferguson* the petitioner had pleaded guilty to two counts charging distribution of marijuana, for which he was liable on each count to five years imprisonment and at least two years mandatory special parole. 21 U.S.C. § 841(b)(1)(B). Although the trial judge advised Ferguson at the time of his pleas that he was subject to five years imprisonment on each count, he failed to mention special parole and later sentenced Ferguson to five years imprisonment and five years special parole on the first count and to a consecutive term of imprisonment for one year and two years special parole on the second. Relying on *Michel*, *supra*, this Court vacated Ferguson's plea of

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* *United States* v. *Richardson*, *supra*, was relied upon by Wright in his petition below and was cited again on the appeal to this Court. (Appellant's Brief, 5). However, the Eighth Circuit departed from that decision in *MacRae* v. *United States*, *supra*, choosing instead to adopt the approach of the Fourth and Seventh Circuits in *Bell* v. *United States*, *supra*, and *Bachner* v. *United States*, *supra*. Of the remaining three cases which arguably support Wright's position here, none explicitly considered whether the "automatic reversal" rule announced in *McCarthy* was applicable in proceedings under Section 2255, and in *Bachner* v. *United States*, *supra* at 597, the Seventh Circuit distinguished *Roberts* on the ground that it had been decided without benefit of the Supreme Court's opinion in *Davis* v. *United States*, *supra*.

guilty. However, no argument was presented to the court based on the rationale of *United States* v. *Bell*, *supra*, that a plea need not be vacated if the cumulated term of years actually imposed was not greater than the maximum sentence about which the trial judge had warned the defendant before accepting his plea. Cumulating the years of imprisonment and the years of special parole for purposes of weighing the impact of the failure to advise Ferguson that he faced special parole, it may be seen that Ferguson, who was advised of no more than ten years imprisonment, was sentenced to a combined total of thirteen years imprisonment and special parole. This result, which was found impermissible in *Ferguson*, would not have passed muster under *Bell*, which holds that "when the prisoner's sentence and special parole term exceed the maximum sentence he was told he could receive . . . [p]ermission to withdraw the plea is then imperative." 521 F.2d at 715. Nor is it likely that the Seventh Circuit, even having decided *United States* v. *Bachner*, *supra*, as it did, would have decided the question differently than this Court did in *Ferguson*, given its decision in *Gates* v. *United States*, *supra*, written by Judge Hastings while *Bachner* was *sub judice* before him and two judges of a different panel of the Seventh Circuit.* The point is

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* The differences between the facts and the outcome in *Bachner* and *Bell*, on the one hand, and *Ferguson*, on the other, suggest a possible measure against which to determine whether a claim attacking a guilty plea is cognizable under Section 2255, at least when it is grounded in the trial court's failure to advise a defendant of the possibility of a mandatory special parole term before accepting his guilty plea. For constitutional purposes, a guilty plea is infirm only when it is not "intelligent" or "voluntary." *Brady* v. *United States*, 397 U.S. 742, 747 (1970); *Boykin* v. *Alabama*, 395 U.S. 238, 242 (1969); *McCarthy* v. *United States*, *supra*, 394 U.S. at 466. This Court noted in *Korenfeld* v. *United States*, 451 F.2d 770, 774 (2d Cir. 1971), *cert. denied*, 406 U.S. 975 (1972), in the context of the "no-parole" provision of the former narcotics laws: "But the mere fact that some defendants

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have pleaded guilty without knowing that they were ineligible for parole does not mean that they have done so involuntarily. The failure of the court to inform a defendant of his ineligibility for parole will only rarely affect the voluntariness of the plea of guilty. *United States* v. *Welton*, 439 F.2d at 826." Likewise a plea is still "intelligent" for constitutional purposes even if it is based on "ordinary error in either . . . [the defendant's] or his attorney's assessment of the law and the facts," *McMann* v. *Richardson*, 397 U.S. 759, 774 (1970), and ignorance of, or even misinformation about, the maximum penalty will not invalidate the plea if the record reflects that the defendant would not have acted differently if fully advised. *Caputo* v. *Henderson*, Dkt. No. 76-2009, (2d Cir. Sept. 3, 1976); *Kelleher* v. *Henderson*, 531 F.2d 78, 82 (2d Cir. 1976); *cf. United States ex rel. Leeson* v. *Damon*, 496 F.2d 718, 721 (2d Cir.), *cert. denied*, 419 U.S. 954 (1974).

Beyond this, as earlier noted, the rule announced in *McCarthy* was not grounded on a constitutional or statutory basis, 394 U.S. at 464, and compliance with the prophylactic procedures of Rule 11 is not constitutionally mandated so long as the defendant's guilty plea is made under constitutionally sufficient circumstances. *Korenfeld* v. *United States*, *supra*, 451 F.2d at 773. *See also United States ex rel Hill* v. *Ternullo*, 510 F.2d 844, 845 n. 1 (2d Cir. 1975); *Roddy* v. *Black*, 516 F.2d 1380, 1383 & n.1 (6th Cir.), *cert. denied*, 423 U.S. 917 (1975); *McChesney* v. *Henderson*, 482 F.2d 1101 (5th Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974). "[I]t is the rule and not the Constitution that requires the trial judge to give the defendant specific and accurate advice about the sentence which may be imposed after conviction." *Bachner* v. *United States*, *supra*, 517 F.2d at 599 (Stevens, *C.J.*, concurring).

However, *Davis* and other cases recognize that federal prisoners may receive post-conviction relief under Section 2255 for deficiencies which do not rise to the level of a deprivation of constitutional rights. We do not suggest that no violation of Rule 11 is cognizable under Section 2255 unless it implicates the defendant's constitutional rights, but rather we respectfully submit that the claim must be of the gravity held necessary by *Davis* and *Hill*. In the context of this case and those like it, we believe that potentially less strict standard for such a claim is more than sufficiently met by cumulating the periods of imprisonment and special parole actually imposed and comparing them with what the defendant was informed of by the court. *Bell* and, inferentially, *Bachner* suggest that if the period of imprisonment of which the defendant was advised is less than the total of the periods of imprisonment and special parole actually fixed, the

[Footnote continued on following page]

simply that the question decided in *Bachner* and *Bell* was not the question raised in *Ferguson*, and the issue here, even if supplemented by assumptions favorable to Wright, is the one before the courts in *Bachner* and *Bell* and not this Court in *Ferguson*. There is no reason to suppose that the *Ferguson* court would have decided the question raised here any differently from the *Bell* and *Bachner* courts.*

Since this Court's decision in *Ferguson*, Judge Palmieri considered a case similar to this one, where a defendant sought to vacate his conviction on the ground that the court failed to warn him of a term of special parole. Although the defendant there did not claim to be unaware of the term of special parole, he sought to invoke *Michel* and *Ferguson* despite the fact that the

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defendant may plead anew. However, this calculus confers a substantial benefit upon a defendant, for, whatever its restraints and contingent liabilities, special parole is simply not the same as imprisonment. This cumulation, we suggest, is more than sufficient to satisfy any lesser standard for "complete miscarriage[s] of justice" which do not rise to claims of constitutional dimensions but are cognizable on collateral attack under Section 2255.

* Indeed, the following language from *Ferguson*, 513 F.2d at 1013,

> "We perceive little difference between a robbery defendant, sentenced to a ten-year prison term, who may during the last five years be released on parole, and the narcotics defendant subject to five years' imprisonment and five years' special parole. In each instance, a prisoner whose behavior is proper will serve only five years, and one whose behavior is less than adequate will serve ten. It would be anomalous indeed, if Rule 11 required the robbery defendant to be advised of a ten-year term,, while the narcotics defendant had to be told only of the five year term,"

strongly suggests that the *Ferguson* court would have reached the same conclusion as the *Bachner* and *Bell* courts had the facts of those cases been before it.

term of imprisonment and special parole imposed upon him did not exceed the total term of imprisonment of which he was warned on the record. Judge Palmieri refused to grant the writ of habeas corpus relying on *Bell* and finding that there was "no significant chance" that the different was misled to his prejudice. *Aviles* v. *United States*, 405 F. Supp. 1374 (S.D.N.Y. 1975), *aff'd*, 537 F.2d 307 (2d Cir.), *cert. denied*, 44 U.S.L.W. 3624 (May 4, 1976).

Here it is likewise apparent that Wright was not misled to his prejudice. He received a sentence of prison and special parole which together was no more than the five year prison term of which he was warned at his plea. The record supports the conclusion that Wright's attorney warned him of the special parole term, since defense counsel specifically acknowledged that he had warned Wright of the penalties and then later exhibited his familiarity with the special parole provision. On this record, we submit, a petition for writ of habeas corpus was properly denied.* It is an an ancient principle in this Circuit that "while lapses should be closely scrutinized, when it appears with certainty that no harm has been done, it would be the merest pedantry to insist upon procedural regularity." *United States* v. *Compagna*, 146 F.2d 524, 528 (2d Cir. 1944) (L. Hand, C.J.), *cert. denied*, 324 U.S. 867 (1945). Judge Hand's views are fully controlling here.

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* Apart from the reasons set forth earlier for the denial of the petition on the ground that it did not raise a claim cognizable under Section 2255, the petition is also barred by Wright's failure to make the claim on direct appeal. *Sunal* v. *Large*, 332 U.S. 174, 178 (1947); *United States* v. *Travers*, *supra*.

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

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United States Attorney for the Southern District of New York, Attorney for the United States of America.

DAVID W. O'CONNOR,
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★ U. S. Government Printing Office 1976— 714—017—722

Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

DAVID W. O'CONNOR being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 18th day of October, 1976 he served a copy of the within Brief by placing the same in a properly postpaid franked envelope addressed:

Arthur Swirtz
521 West Court St
Flint, Michigan 48502

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

David W. O'Connor

Sworn to before me this

18th day of October, 1976

Maria A. Israelian

MARIA A. ISRAELIAN
Notary Public, State of New York
No. 31-4521851
Qualified in New York County
Term Expires March 30, 1978